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Supreme Court, U.S.
FILED
OCT 8 1997
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No. 96-1430

In The

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

Petitioners,

v.

PATRICK J. SCHLEIBAUM,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Thomas D. Birge
Counsel of Record for Respondent
Birge & Mayers, P.C.
1700 Broadway
Suite 1501
Denver, Colorado 80290
(303) 860-7100

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Pursuant to S. Ct. Rule 39, Respondent and Cross-Petitioner, Patrick J. Schleibaum ("Respondent") moves this Court for leave to proceed *in forma pauperis* and in support of this motion states as follows:

1. Respondent was released from Lompoc Federal Prison Camp in July 1996 after 17 months of incarceration in connection with the within case. He was released to Pacific Furlough Facility Halfway House, San Diego, California. Then Respondent was released from the halfway house to the U.S. Probation Department on November 8,1996. At that time, Respondent was placed on "supervised release". In all, Respondent has spent 21 of the last 31 months confined in the Bureau of Prison System with little opportunity for employment.

2. Respondent has only been able to find part-time employment since being placed on supervised release. See Respondent's Affidavit in Support of Motion to Proceed on Appeal *in Forma Pauperis*, attached hereto.

3. In addition to his incarceration, the Judgment In A Criminal Case, issued by the United States District Court for the District of Colorado, requires Respondent to pay a fine of $6,000.00. Although Respondent has made payments on this fine, a balance is still outstanding. Furthermore, said Judgment also requires Respondent to pay $180.90 per month for each month of his supervised release.

4. Respondent is not able to pay the fees and costs in connection with this appeal nor is he able to give security therefor.

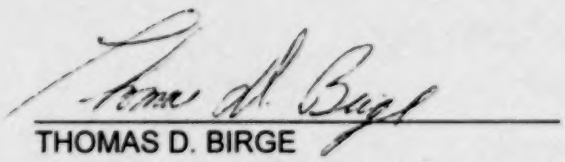
5. Pursuant to S. Ct. Rule 39(1), attached hereto is Respondent's Affidavit in Support of Motion to Proceed on Appeal *in Forma Pauperis*.

6. Leave to proceed *in forma pauperis* has only been sought in No. 96-8626.

7. Respondent is entitled to redress as set forth in 28 U.S.C. §1915.

WHEREFORE, Respondent Patrick J. Schleibaum respectfully requests this Court for permission to proceed *in forma pauperis*.

Dated this 7th day of October, 1997.



THOMAS D. BIRGE

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,
Petitioner

v. No. 96-1430

PATRICK J. SCHLEIBAUM,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Patrick J. Schleibaum, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in the United States Supreme Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

1. Was Count II of the indictment in the underlying case duplicitous?

2. Can the government bring a charge under 18 U.S.C. §1001 when there is a more specific statute, 15 U.S.C. §78ff(a) which applies to filings with the Securities and Exchange Commission?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the Petition for a Writ of Certiorari are true.

1. Are you presently employed? Part-time YES
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Self Employed. No Salary. Jobs performed And paid for equal Approx. $200 last month. Amount has varied but has never exceeded $250 in any of the last 6 months.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve month any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? YES____ NO X See 1 Above.
   a. If the answer is yes, describe each source of income, and state, the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? YES X NO___
   a. If the answer is yes, state the total value of the items owned.
   Savings $1,500.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   YES X NO ____
   a. If the answer is yes, describe the property and state its approximate value. 1992 Ford Explorer (½) $4,000.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None. My wife is supporting me As are her parents.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Patrick J. Schleibaum

STATE OF IDAHO)
)ss
COUNTY OF ADA)

SUBSCRIBED AND SWORN TO before me this 4TH day of OCTOBER, 1997 by Patrick J. Schleibaum.

NOTARY PUBLIC
My Commission Expires: 9-2-00

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

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CERTIFICATE OF SERVICE

It is hereby certified that all parties requires to be served have been served copies of the **Motion For Leave to Proceed *In Forma Pauperis;* attached Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis** and ***Brief For Respondent In Response To Petition for Writ of Certiorari*** by first class mail, postage prepaid, on this 7th day of October, 1997.

See attached Service List.

Thomas D. Birge
Counsel of Record for Respondent
Birge & Mayers, P.C.
1700 Broadway, Suite 1501
Denver, Colorado 80290
(303) 860-7100

SERVICE LIST

Solicitor General of the United States
Department of Justice
10th Street and Constitution Avenue, N.W., Room 5614
Washington, D.C. 20530
(202) 514-2217
Counsel for The United States of America

Walter Dellinger
Acting Solicitor General
Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, D.C. 20530-0001
(202) 514-2217
Counsel for The United States of America

Daniel J. Sears, P.C.
430 East 7th Avenue
Suite 200
Denver, CO 80203
303) 860-8100
Counsel for Quentin T. Wiles

Michael R. Doyan
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071
(213) 683-9100
Counsel for Quentin T. Wiles

Robert A. Dill
455 Sherman Street
Suite 300
Denver, CO 80202
(303) 777-3737
Counsel for Quinten T. Wiles

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v.

PATRICK J. SCHLEIBAUM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Thomas D. Birge
Counsel of Record for Respondent
Birge & Mayers, P.C.
1700 Broadway
Suite 1501
Denver, Colorado 80290
(303) 860-7100

QUESTION PRESENTED

Whether Respondent was entitled to a reversal of his false-statements conviction under ***United States v. Gaudin***, 115 S.Ct. 2310 (1995), where the Respondent contested the evidence on materiality and the trial court, without objection, resolved the issue of materiality itself rather than submitting it to the jury.

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BRIEF FOR RESPONDENT IN RESPONSE TO PETITION FOR WRIT OFCERTIORARI

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a - 74a) is reported at 102 F.3d 1043

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1996. The jurisdiction of this Court is appropriate under 28 U.S.C. § 1254(1)

STATEMENT

Petitioner's statement is an accurate statement of the history of the case. Respondent challenged the sufficiency of the prosecution's evidence regarding materiality. (Pet. App. 17a).[1] The basis of the challenge was the prosecution's failure to put on any evidence concerning the impact that an allegedly false Form 10-K could have on the Securities Exchange Commission, the governmental agency involved. The Court of Appeals reversed Respondent's conviction without addressing the sufficiency of the prosecution's evidence. (Pet. App. 17a). The majority of the Court held that the type of error that occurred in this case was "structural" error which was reversible per se. (Pet. App. 21a-37a).

ARGUMENT

On March 11, 1997, Petitioner filed its Petition for Writ of Certiorari asking the Court to hold its Petition for Writ of Certiorari until the opinion in ***Johnson v. United States***, No. 96-203. In April 1997, Respondent filed a Conditional Cross Petition which

was docketed as Case No. 96-8626. In a related case, a Co-Defendant, Quentin T. Wiles filed a Petition for Writ of Certiorari in Case No. 96-1839. The Court directed that a response to the government's Petition be filed by Respondent.

For the reasons set forth below, Respondent asks the Court to grant both the Petition and Conditional Cross Petition, vacate the conviction on Count II and remand the decision on Count I to the court of appeals for further consideration in light of this Court's opinion in ***Johnson v. United States***, 117 S.Ct. 1544 (1997).

Respondent was charged in a two count indictment with making false statements to the government in violation of 18 U.S.C. § 1001 and securities fraud in violation of 15 U.S.C. § 78j(b), 15 U.S.C. § 78ff(a) and 17 C.F.R. § 240.10b-5. The trial court instructed the jury that it would decide materiality under 18 U.S.C. §1001.

Respondent challenged the sufficiency of the evidence which the government presented on the 1001 charge. Specifically, Respondent challenged the government's evidence of materiality (Pet. App. p.17a). Respondent argued to the trial court at the close of the prosecution's case that the government had failed to prove that a government decision might be affected by the alleged false statement. The prosecution failed to call any witnesses to identify or describe how the alleged false statement might impact a government decision. The government was required to establish this element to obtain a conviction on Count I.

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[1] "Pet. App." refers to the appendix filed in No. 96-1430.

The trial court denied Respondent's motion and removed the element of materiality from the jury's deliberations. Under this Court's opinion in ***United States v. Gaudin***, 115 S.Ct. 2310 (1995), this constituted error.

The teaching of this Court's opinion in ***Johnson v. United States***, 117 S.Ct. 1544 (1997), suggests that the trial court's error may have to be evaluated under the plain error standard of Federal Rules of Criminal Procedure 52(b). The Court's opinion in ***Johnson*** articulates a different standard than applied by the majority of the Court of Appeals. The "per se" approach applied by the majority was rejected by this Court in ***Johnson***. Therefore, the case should be remanded for further review. Because no appellate court has reviewed the conviction under the test in ***Johnson***, the case should be remanded for a determination of the factors set forth in ***Johnson***.

Under this Court's opinion in ***Johnson v. United States***, this failure to instruct was both error and plain. *See* ***Johnson,*** 117 S.Ct. at 1549. Unlike ***Johnson***, this error effected substantial rights. Respondent has continually contested the government's proof on materiality and consistently pointed out the failures in the government's case on this issue. Under these circumstances, the failure to submit this issue to the jury seriously effects the fairness, integrity and public reputation of judicial proceedings. Therefore, the trial court's error is reversible under ***Johnson v. United States*** and ***United States v. Olano***, 507 U.S. 725 (1993).

CONCLUSION

The Respondent respectfully requests that the Court grant the Petition and Conditional Cross-Petition. Respondent requests further that the decision on Count I be remanded to the Court of Appeals and that the conviction on Count II be reversed.

THOMAS D. BIRGE

October, 1997